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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 882

JOSEPH B. WHITE,

Petitioner,

v.

STEPHEN O'HEARNE, DEPUTY COMMISSIONER BUREAU OF EMPLOYEES' COMPENSATION, FOURTH COMPENSATION DISTRICT, AND MARYLAND SHIPBUILDING AND DRY-DOCK CO.

JAMES PURDHAM,

Petitioner,

v.

STEPHEN O'HEARNE, DEPUTY COMMISSIONER BUREAU OF EMPLOYEES' COMPENSATION, FOURTH COMPENSATION DISTRICT, AND MARYLAND SHIPBUILDING AND DRY-DOCK CO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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INDEX

Table of Contents

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statute Involved	4
Statement of Case	4
Reasons for Granting Writ	7
I. The Petitioners' Average Weekly Wage Should Be Computed Under Subsection (b) of Section 910 of the Act	8
II. Even if the Use of Subsection (c) Were Proper It Was Not Properly Applied	11
III. The Term "Class" as Used in Section 910 of the Act for the Purposes of the Joseph B. White Case Means "Chippers and Caulkers First Class," and for the Purposes of the James Purdham Case Means "Shipfitters First Class" as Those Terms Are Used in the Labor-Management Agreement Between the Maryland Shipbuilding & Drydock Company and the Petitioners' Union	13
Conclusion	15
Appendix A—Opinion and Judgment of the U. S. Circuit Court of Appeals for the 4th Circuit	1a
Opinion (oral) of the U. S. District Court for the District of Maryland	5a
Compensation Order of the Deputy Commissioner of the Bureau of Employees Compensation in the case of Joseph B. White	9a

PAGE

Compensation Order of the Deputy Commissioner of the Bureau of Employees Compensation in the case of James Purdham 11a

Memorandum in Support of Compensation Orders 13a

APPENDIX B—Statute Involved 20a

TABLE OF CITATIONS

Cases

Baltimore & O. R. Co. v. Clark, 56 F. 2d 595 (4 Cir. 1932) 10

Johnson v. Britton, 290 F. 2d 355 (U.S. App. D.C.), cert. denied 368 U.S. 859 (1961) 10

Mahony Co. v. Marshall, 46 F. 2d 539, (W.D. Wash. 1931), aff'd 56 F. 2d 7 (9th Cir. 1932) 9

O'Hearne v. Maryland Casualty Co., 177 F. 2d 979 (4 Cir. 1949) 9

Statutes

Defense Bases Act, 42 U.S.C. 1651, et seq 7

District of Columbia Compensation Act, 36 D.C. Code 501, et seq 7

Sec. 910 of the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C.A. 901, et seq. 2, 3, 4, 7, 8, 9, 10, 11, 12, 13. 15

28 U.S.C., Sec. 1254(1) 2

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The Petitioners, Joseph B. White and James Purdham, respectfully pray that a Writ of Certiorari issue to review

the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on November 9, 1964.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit has not been reported as yet but is set forth in App. A at page 1a.

The oral opinion of the United States District Court for the District of Maryland is set forth in App. A at page 5a.

The Compensation Orders of the Deputy Commissioner (Case No. 61-3476 — Joseph B. White; Case No. 61-3485 — James Purdham), in App. A at pages 9a, 11a.

The Memorandum of the Deputy Commissioner in Support of the Compensation Orders, in App. A at page 13a.

JURISDICTION

The judgment of the Court of Appeals was entered in the above entitled action on November 9, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

I. Although the facts of the Petitioners' respective employment in this case clearly come within the provisions of Subsection (b) of Section 910 of the Longshoremen's and Harbor Workers' Compensation Act, infra, hereinafter called the Act, the Deputy Commissioner applied Subsection (c) in determining their compensation benefits. The question that arises must be stated in two parts:

a. (In the language of the subsection (b).) Under the Longshoremen's and Harbor Workers' Compensation Act, infra, where "the injured employee [has not] worked in

the employment in which he was working at the time of the injury . . . during substantially the whole of the year immediately preceding his injury" and there is "an employee of the same class (who has worked) substantially the whole of such immediately preceding year in the same . . . employment," may the Deputy Commissioner, in determining the injured employee's compensation benefit, apply Subsection (c) of Section 910 of the Act rather than Subsection (b) without a showing that Subsection (b) could not reasonably and fairly be applied?

b. Where there are other employees of the same class whose work is substantially regular and continuous, does the mere irregularity or intermittence of the injured employee's work make it unreasonable or unfair to apply the formula set forth in Subsection (b) of Section 910 of the Act?

II. Although the Deputy Commissioner indicated that he used Subsection (c) in determining the Petitioners' respective compensation benefits, he did not have "regard to the previous earnings . . . of other employees of the same or most similar class" as that of the Petitioners' respectively.

Under Subsection (c) of Section 910 of the Longshoremen's and Harbor Workers' Compensation Act, may the Deputy Commissioner merely take the average weekly wage earned by the injured employee during the 52 weeks prior to his injury as the basis upon which to compute his compensation benefits without taking into consideration the earnings of other employees of the same class working for the same employer?

III. The Deputy Commissioner held that an injured employee who enjoys a seniority standing under a typical seniority provision of a labor-management agreement does not belong to any class of employees as that term "class"

is used in the statute. This holding would preclude such an employee from the benefit of having his rate of compensation based on the earnings of a fellow employee of the same class who has worked substantially throughout the statutory period as provided in Subsection (b) or from the benefit of having his earnings considered with those of other employees of the same class as provided by Subsection (c).

a. Does an injured employee's seniority standing under a typical seniority provision of a labor-management agreement deprive him of the benefit of having his compensation computed under Subsection (b) of Section 910 of the Act?

b. Does an injured employee's seniority standing under a typical seniority provision of a labor-management agreement deprive him of the benefit of having the earnings of fellow employees considered in the computation of his compensation as provided by Subsection (c) of Section 910 of the Act?

STATUTE INVOLVED

The statute involved in this case is Section 910 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A., 901 et seq., hereinafter referred to as the Act. This section of the Act is fully set forth in App. B, infra, page 20a.

STATEMENT OF THE CASE

The Petitioners, Joseph B. White and James Purdham, sustained accidental injuries arising out of and in the course of their employment in 1962, which resulted in substantial periods of total disability and thereafter in permanent partial disability. At the time of their injuries, both Petitioners were receiving wages of $3.00 per hour for a standard forty hour week — a gross weekly wage of $120.00.

Yet, they were awarded compensation in the amount of $22.99 per week and $47.76 per week respectively. These awards were affirmed by the District Court and the Circuit Court of Appeals. These cases were consolidated by the District Court.

As to Joseph B. White

On March 30, 1962, the Petitioner, a chipper and caulker for the Maryland Shipbuilding and Drydock Company, sustained an accidental injury to his left foot, arising out of and in the course of his employment. As a result thereof, the Petitioner was totally disabled from March 31, 1962 to June 3, 1962, inclusive, a period of 9⅔ weeks. The Deputy Commissioner found that as a further result of said injury, the Petitioner has a permanent partial disability equal to 17.5% loss of use of his left foot and was therefore entitled to 35.88 weeks of compensation. The Deputy Commissioner fixed the rate of compensation at $22.99 per week.

During the period from March 30, 1961 to March 29, 1962, the twelve month period immediately preceding the date of the Petitioner's injury, there were 92 employees in the chippers and caulkers seniority unit. The first 23 men in seniority standing earned more than 200 days pay The Petitioner, who was 58th in the seniority standing, earned 74 days pay. All of these employees had the same wage rate of $3.00 per hour.

During the periods of his unemployment due to layoff for lack of work, the Petitioner received unemployment compensation under the Maryland Unemployment Compensation Law at the rate of $37.00 per week.

As to James Purdham

On May 4, 1962, the Petitioner, a shipfitter for the Maryland Shipbuilding and Drydock Company, sustained an accidental injury to his left hand, arising out of and in the

course of his employment. As a result thereof, the Petitioner was wholly disabled from May 5, 1962 to July 1, 1962, inclusive, a period of 8⅔ weeks. The Deputy Commissioner found that as a further result of said injury, the Petitioner has a permanent partial disability equal to 10% loss of use of his left hand and was therefore entitled to 24.4 weeks of compensation. The Deputy Commissioner fixed the rate of compensation at $47.76 per week.

During the period from May 4, 1961 to May 3, 1962, the twelve month period immediately preceding the date of the Petitioner's injury, there were 41 employees in the shipfitter seniority unit. The first 13 men in seniority standing earned more than 200 days pay. The 14th man earned 194 days pay; the 15th, 187 days pay; the 16th, 185 days pay. The Petitioner who was 17th in seniority standing, earned 149 days pay. All of these employees had the same wage rate of $3.00 per hour. The employer's records indicate that the Petitioner would have been employed throughout the period of his temporary total disability.

Common to Both

The Petitioners are members of Local 31 of the Industrial Union of Marine and Shipbuilding Workers of America. Their employment at the employer's shipyard is covered by a labor-management agreement between that union and the employer. This agreement contains a seniority provision which is typical of that contained in most labor-management agreements. Under this provision, the employees at the employer's shipyard are grouped into various and separate seniority units according to the craft in which they work. When a reduction of the work force in a unit is necessitated by a lack of work, an employee having less seniority in point of length of service with the employer will be laid off before other employees having

greater seniority. In like manner, this same employee would not be recalled to work in his seniority unit until men who have greater seniority and who are also on lay-off status, are recalled.

For a great many years, the employer has operated what can be regarded as one of the nation's major shipyards in the Port of Baltimore. Through the years, long beyond any period of time relevant to this case, the employer has been in continuous operation, as have its ironworking department, of which the chippers and caulkers are a part, and its shipfitting department. During the five year period from 1958 through 1962, the employer's sales were as follows: 1958 — $35,554,334; 1959 — $26,379,649; 1960 — $29,357,947; 1961 — $29,683,925; and 1962 — $22,735,089. The average dollar volume of sales for this five year period was $28,741,388.

REASONS FOR GRANTING WRIT

This case presents an issue of extremely great importance to the adjudication of each and every workmen's compensation claim throughout the country arising under the Longshoremen's and Harbor Workers' Compensation Act, supra, and the other compensation acts modeled after it, to wit: District of Columbia Compensation Act (36 D.C. Code 501, et seq.) and Defense Bases Act (42 U.S. Code 1651, et seq.). The questions presented in this case involve the method of computing the injured employee's average weekly wage for the purpose of determining the amount of his weekly compensation benefit.

As a result of the decision now before the Court and other decisions mentioned herein, the present status of the law works a great hardship upon a large number of Claimants situated similarly to the Petitioners. The Petitioner White's case illustrates this hardship very well. Although his em-

ployment did fluctuate, the record shows that he would have worked throughout the 9⅞ weeks of his total disability. During this period he would have earned $120.00 per week; yet, the Deputy Commissioner fixed the rate of his compensation at $22.99 per week.* This substandard rate of compensation was computed by the Deputy Commissioner by dividing the Petitioner's actual earnings during the year preceding his injury, by 52.

Prior to 1961, when Congress increased the maximum compensation benefits under the Act from $54.00 per week to $70.00 per week, the employer did not raise the issue of average weekly wage and the claimants situated similarly to the Petitioners were invariably allowed the maximum compensation benefits. However, if the decision in the case now before the Court is permitted to stand, we can expect the application of the abovementioned method of computation of benefits in every similar case throughout the country. This case, therefore, is of importance far beyond the particular facts and parties involved herein. It would seem that only a decision by this Court correcting the misinterpretation of Section 910 of the Act can prevent economic distress to many claimants under the Longshoremen's and Harbor Workers' Compensation Act and similar acts.

I.

The Petitioners' Average Weekly Wage Should Be Computed under Subsection (b) of Section 910 of the Act.

It is the position of the Petitioners that Subsection (b) is the appropriate section upon which to compute their

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* It is interesting to note that if White had been off from work because of a layoff rather than because of his injury, he would have received $37.00 per week unemployment compensation under the Maryland Unemployment Compensation Law.

compensation. These cases fall within the clear meaning of this subsection: the Petitioners did not work during substantially the whole of the year immediately preceding their injuries and there were employees of the same class(es) working substantially the whole of such immediately preceding year in the same employment. However, the Deputy Commissioner held that Subsection (b) "was designed to protect new employees entering an employment that is substantially continuous" and refused to apply it in computing the Petitioners' compensation. Instead, the Deputy Commissioner used Subsection (c) in making his computations. (That he did so incorrectly is discussed later.) The decision was affirmed by the District Court and the Circuit Court of Appeals.

Certainly the narrow interpretation of Subsection (b) made by the Deputy Commissioner cannot be correct. The language is clear. Subsection (b) is to be used if the injured employee did not work substantially the whole year immediately preceding his injury and there is an employee of the same class who did work substantially the whole of that year.

Subsection (c) is to be used only if Subsections (a) and (b) "cannot reasonably and fairly be applied." *O'Hearne v. Maryland Casualty Company*, 177 F. 2d 979 (4th Cir., 1949).

Yet, the Circuit Court of Appeals held that Subsection (b) could not be applied "because the [Petitioners'] employment during the appropriate statutory period was intermittent and irregular in nature. . . ." There is no requirement in the statute that Subsection (b) may be applied only where the employment is regular and continuous. This concept was introduced in 1931 by a District Court in the case of *Mahony Company v. Marshall*, 46 F. 2d 539

(W.D. Wash.). This case was affirmed by the Circuit Court of Appeals for the Ninth Circuit and reported in 56 F. 2d 74, and has been followed in the Fourth Circuit, *Baltimore & O. R. Co. v. Clark*, 56 F. 2d 595 (4th Cir., 1932), and the United States Court of Appeals for the District of Columbia, *Johnson v. Britton*, 290 F. 2d 355, cert. denied, 368 U.S. 859 (1961), and now again in the Fourth Circuit in the instant case.

The rationale of these cases is that the irregularity and intermittence of employment necessarily make it unfair and unreasonable to apply Subsection (b). That this rationale will not stand the test of logic can be illustrated readily by the facts in Petitioner Purdham's case.

According to the employer's record, had Purdham not been injured on May 4, 1962, he would have continued to work through August 1, 1962, which is as far as the record went. (There is no evidence of Purdham's refusing work when it was available.) During this time, he would have made $120 per week. His period of temporary total disability extended from May 5, to July 1, 1962 when he returned to work. It is certainly not unreasonable or unfair to pay him compensation for this period of time based on a wage earning capacity of an amount that would approximate $120.00 per week, as would be the case is Subsection (b) were used. In fact, it would seem grossly unreasonable and unfair to base his compensation on a lower figure. This is true in Petitioner White's case also.

Of course, the amount of weekly compensation set for this period of temporary total disability would be the same amount used for the payment of permanent partial disability. However, even here it would not be unreasonable or unfair to use Subsection (b) to determine Petitioners' rate of compensation.

Purdham is 17th in seniority standing in his classification. The first 13 men worked substantially the whole of the twelve month period immediately prior to his injury. This means that there were only 3 men between him and his being substantially continuously employed — *even in a year when the employer's sales were more than 20% less than its average for the five years prior thereto.* Indeed, it would seem unreasonable and unfair to limit Purdham to a rate of compensation for permanent disability because the employer's sales had dropped during the twelve month period upon which his compensation is to be calculated. Even if the employer's business did not improve in time to come, it is predictable that, by reason of the retirement of older employees, in a few years Purdham himself would be among the group of men who do work substantially the entire year. This expectancy is one of the effects of the seniority provisions discussed earlier.

Thus, it would appear to be unreasonable and unfair *not* to apply the formula in Subsection (b) in the computation of the Petitioners' rate of compensation.

The judicially created requirement of regular and continuous employment for the application of Subsection (b) frustrates the remedial purpose of the Act and derogates the fundamental rule of law that such a statute must be liberally construed.

II.

Even if the Use of Subsection (c) Were Proper, It Was Not Properly Applied.

The Deputy Commissioner considered only the actual earnings of the Petitioners during the twelve month period immediately prior to the date of their injuries. He divided this gross amount by 52 to arrive at the Petitioners' average

weekly wage. This is clearly erroneous. Even under Subsection (c) the Deputy Commissioner was required to take into consideration the earnings of other employees within the Petitioners' seniority units:

The Court of Appeals in its opinion stated that the Deputy Commissioner did consider the earnings of employees performing the same work as the Petitioners. A reading of the Deputy Commissioner's memorandum (App. A, p. 13a) will not support this statement. There is no reference whatever to the earnings of other chippers and caulkers in the Petitioner White's case. The Deputy Commissioner does mention the earnings of the employee immediately above the Petitioner Purdham in seniority standing and the earnings of the employee immediately below; but, consistent with his interpretation of the effect of the seniority provision of the labor-management agreement under which the Petitioners worked, the Deputy Commissioner expressly refused to consider the earnings of these other employees. Referring to the employee immediately above the Petitioner Purdham, he said (App. A, p. 18a): "The claimant did not have the capacity in this employment to earn the wage of Kleppert because of the seniority rule."

Even if he had considered the earnings mentioned, it would hardly seem appropriate to have made such a sparse sampling of the earning experiences within the Petitioners' respective classes.

III.

The Term "Class" as used in Section 910 of the Act for the Purposes of the Joseph B. White Case means "Chippers and Caulkers First Class", and for the Purposes of the James Purdham Case means "Shipfitters First Class," as those Terms are used in the Labor-Management Agreement between the Maryland Shipbuilding & Drydock Company and the Petitioners' Union.

There is yet another erroneous interpretation of the statute in this case. This involves the meaning of the term "class" as it is used in Subsection (b) in the phrase "employee of the same class" and in Subsection (c) in the phrase "employees of the same or most similar class."

It would seem that defining the class of employees to which each Petitioner in the instant cases belongs would present no problem. Since 1939, the employees of the Maryland Shipbuilding and Drydock Company have been classified by the labor-management agreement under which they work. This classification has been honored by the experience of over twenty-five years. It forms the basis in many respects for the employer's mode of operation and for the rights of the employees.

Under this classification, the employees of the Maryland Shipbuilding and Drydock Company are placed in groups according to their craft and according to their skill and ability in that craft. Except under certain circumstances, they are not permitted to do work outside of their craft. All of the employees working within each classification are to be treated equally with respect to the hourly rate paid them and the amount of overtime given them.

The class to which Petitioner White belongs is that of "chipper and caulker first class"; the class to which the

Petitioner Purdham belongs is that of "shipfitter first class." This classification is reasonable and workable and is the basis upon which the employer-employee relationship exists between the Petitioners and the employer, Maryland Shipbuilding and Drydock Company.

Yet, the Deputy Commissioner disregarded this classification. In his memorandum (App. A, p. 15a), he says: "If, 'employee of the same class' is to be distinguished from 'employee of the same classification', then there is no other employee in the same class as either of these two employees on a seniority basis as established by the union agreement." Thus, he negates the existence of any class of employees to which the Petitioners or anyone working under a typical seniority provision of a labor-management agreement belong.

This interpretation was affirmed by Judge Winter of the District Court, who, in his oral opinion, said:

> "I think, as the Deputy Commissioner rather convincingly spells out in his memorandum, that when you introduce into the carrying on of any occupation all of the restrictions and preferences of a strict seniority system, that in looking for comparables, about the only true comparable that exists with respect to an employee working in such a stratified occupation is the experience with reference to that employee himself."

Judge Winter then went on to say that he did not think it necessary for the Deputy Commissioner to have considered any evidence of earnings other than that of the Petitioners themselves (App. A, page 7a).

The impact of this concept upon cases arising under the Act cannot be exaggerated. It would deprive any employee working under a labor-management agreement containing the typical seniority provisions of the benefit of

the formula set forth in Subsection (b) of Section 910 and of a favorable computation of compensation benefits under Subsection (c). When one considers that probably more than 80% of the shipyard workers throughout the country work under such a seniority provision, one can appreciate the magnitude of this holding.

This Court has never construed Section 910 of the Longshoremen's and Harbor Workers' Compensation Act as it relates to the problem in this case. It is respectfully submitted that this matter should be settled by this Court since it affects the rights of numerous claimants throughout the country who are not in a position to engage in protracted and expensive appeals from erroneous administrative determinations by the Deputy Commissioners and their staff of claims examiners and who therefore must of necessity accept compensation benefits in amounts less than which they are properly and legally entitled.

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioners.

APPENDIX A

OPINIONS BELOW

United States Court of Appeals for the Fourth Circuit

No. 9520

Joseph B. White and James Purdham,
Appellants,

versus

Stephen O'Hearne, Deputy Commissioner, Bureau of Employees' Compensation, Fourth Compensation District, and Maryland Shipbuilding & Drydock Company,
Appellees.

Appeals from the United States District Court for the District of Maryland, at Baltimore
Harrison L. Winter, District Judge.

(Argued September 22, 1964. Decided November 9, 1964.)

Before Sobeloff, Chief Judge, and Haynsworth and J. Spencer Bell, Circuit Judges.

Bernard G. Link for Appellants, and George M. Lilly, Attorney, United States Department of Labor, (Charles Donahue, Solicitor, and Alfred H. Myers, Attorney, United States Department of Labor, and Thomas J. Kenny, United States Attorney, and Joseph H. H. Kaplan, Assistant United States Attorney, on brief) for Appellee Stephen O'Hearne, and Thomas E. Cinnamond (Semmes, Bowen & Semmes on brief) for Appellee Maryland Shipbuilding and Drydock Company.

PER CURIAM:

The appellants, two employees of the Maryland Shipbuilding and Drydock Company injured in the course of their employment, seek review of a judgment of the district court affirming compensation orders and awards under the Longshoremen's and Harbor Workers' Compensation Act by the Deputy Commissioner of the Department of Labor's Bureau of Employees' Compensation, Fourth Compensation District.

This appeal raises two issues. It is contended first that the Deputy Commissioner should have used subsection (b) of section 910 of the Act[1], rather than subsection (c), in

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[1] The relevant parts of 33 U.S.C.A. § 910 are:

"§ 910. Determination of pay

"Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

"(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

"(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings, if a six-day worker, shall consist of three hundred times the average daily wage or salary, and, if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

"(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-em-

computing the earnings of these employees for purposes of the compensation award, and second, that even if subsection (c) was the correct section, it was misapplied. Both issues must be decided against the appellants.

On the first issue, we agree with the district court that the evidence in the record amply supports the Deputy Commissioner's findings of fact and conclusions of law that because their employment during the appropriate statutory period was intermittent and irregular in nature, these employees are not within the categories covered by subsections (a) and (b) of the Act. This point was long ago clearly settled in this Circuit by the opinion in *Baltimore & O. R.R. Co. v. Clark*, 59 F. 2d 595 (4 Cir. 1932), and reaffirmed in *O'Hearne v. Maryland Casualty Co.*, 177 F. 2d 979 (4 Cir. 1949). In the former case the principle is discussed at length, and we see no need to repeat what was said there, since its application to the facts in this case is obvious.

As to the second point, appellants assert that the Deputy Commissioner considered only their actual earnings during the twelve month period preceding the injury even though the statute required that he consider the earnings of other employees in appellants' seniority units. The record before us clearly shows, however, that the Deputy Commissioner considered and compared the earning records of employees performing the same work who had both higher and lower seniority status than the litigants. After making the comparison, he reached the expert conclusion that the use of the litigants' actual earnings for the previous twelve month period was fair and equitable to all concerned, because the seniority system controlled the availability of work for the individual employee, resulting in substantial differentials in earnings. The weight which the Deputy Commissioner gave to these facts is a matter within his expert competence; and since his conclusions are in accordance with law, we must accept them. 33 U.S.C.A. §921; *Walsh Stevedoring*

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ployment, shall reasonably represent the annual earning capacity of the injured employee.

"(d) The average weekly wages of an employee shall be one fifty-second part of his average annual earnings."

Co. v. Henderson, 203 F. 2d 501 (5 Cir. 1953); *Colonna's Shipyard, Inc. v. O'Hearne*, 200 F. 2d 220 (4 Cir. 1952).

The appellants' reliance upon *Fireman's Fund Ins. Co. v. Peterson*, 120 F. 2d 547 (9 Cir. 1941), is not well taken. The opinion in that case clearly states that the award was set aside because there was no evidence that the previous earnings of other employees had been considered. Here the Deputy Commissioner's memorandum in support of the compensation orders expressly recites that he considered the earnings of other employees; however, he concluded that this information did not justify changing his decision to use the appellants' actual earning experience as the basis for the compensation awards.

Affirmed.

JUDGMENT

(Filed November 9, 1964)

United States Court of Appeals
For the Fourth Circuit

No. 9520

Joseph B. White and James Purdham,
Appellants.

vs.

Stephen O'Hearne, Deputy Commissioner, Bureau of Employees' Compensation, Fourth Compensation District, and Maryland Shipbuilding & Drydock Company,
Appellees.

Appeal from the United States District Court for the District of Maryland.

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed; and that the costs on appeals of Maryland Shipbuilding & Drydock Company be borne by the appellants.

CLEMENT F. HAYNSWORTH, JR.,
United States Circuit Judge.

November 9, 1964.

A true copy,

TESTE:

MAURICE S. DEAN,
Clerk.

ORAL OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

WINTER, J.

The problem in this case is essentially whether the Deputy Commissioner has correctly interpreted and applied Section 910 of the Act in determining what award should be made to the two claimants, Mr. White and Mr. Purdham, respectively.

The Deputy Commissioner, after hearing all of the evidence, concluded that Subsection (c) of that section was the portion of the law under which an award was to be made.

It is claimed that the Deputy Commissioner was in error, that, rather, he should have determined the amount of the award under Subsection (b). Section 910 in its entirety is the congressional effort to measure the lost earning power occasioned by death or accidental injury under the Act and to project its value in the event that benefits under the Act become payable by reason of accident or death.

The congressional policy is fairly well fixed that the projection is to be made on earning power of the last

twelve months, depending upon in which of the three categories spelled out in Section 910 a particular employee may fit.

As I read the Deputy Commissioner's findings in this case, as supplemented by his memorandum, in essence, what he has said is that he has found, first, that Section 910(a) is inapplicable because neither employee worked for this particular employer or a similar employer during substantially the whole of the year immediately preceding his injury. No contest in this appeal is made as to the correctness of this finding.

The Deputy Commissioner has found secondly that Section 910(b) does not apply either because he has found that the injured employee shall not have worked in the employment during substantially the whole of such year. He concludes that Section 910(b) does not apply because, as I read what he has written, he has found, at least for the Baltimore area and not limited to this employer, but, rather, including all similar employers in the Baltimore area, that with respect to these two employees, having their skills, their grade of efficiency and their seniority rights, that for the year immediately preceding the date of injury, the work afforded them was discontinuous and intermittent, and by reason of the fact of being discontinuous and intermittent, that it would not be fair, to paraphrase the language of Subsection (c), to use the test of Subsection (b) of Section 910 because the result would be to create a projection of future economic earning capacity way above any sense of reality or actuality, insofar as it was based upon the foreseeable future as he could see it but, more particularly, based upon a projection of what had taken place in the year immediately preceding the accident.

There is no question in my mind whatsoever that, based upon the Baltimore and Ohio Railroad Company vs. Clark decision in 59 Fed. 2d at 595, as repeated, you might say, with approval — I think the essential holding was repeated with approval, although you had a different fact situation and a different result — in O'Hearne vs. Maryland Casualty

Company, 177 Fed. 2d 979, but to go back, under these authorities, there seems to my mind to be little question but that if you find that employment is discontinuous and intermittent, that an award under Subsection (b) would be improper as a matter of law.

As I have said, the Deputy Commissioner has found that the work was discontinuous and intermittent, and on reviewing the evidence, I certainly cannot say that on the record as a whole, that that finding is not adequately and properly and fairly supported by substantial evidence.

That being so, in the exercise of any right of review, even if I were to disagree with his conclusion, I would have no legal authority to disturb it.

It seems to me, therefore, as to the first proposition decided by the Deputy Commissioner and the first line of attack made on the conclusions of the Deputy Commissioner, that, first, the Deputy Commissioner was correct and, secondly, that there is no merit in the attack.

A second ground of attack on the award is the actual computation of the actual benefits to White and to Purdham. I think, as the Deputy Commissioner rather convincingly spells out in his memorandum, that when you introduce into the carrying on of any occupation all of the restrictions and preferences of a strict seniority system, that in looking for comparables, about the only true comparable that exists with respect to an employee working in such a stratified occupation is the experience with reference to that employee himself.

Notwithstanding that I am inclined to think that the Deputy Commissioner could have limited his considerations to simply what these particular employees made themselves and not consider any other evidence, there is no question about the fact that other evidence of other comparables was offered and received by the Deputy Commissioner and considered by him.

I think, of course, the two best comparables are the man having (a) the next higher seniority rating and (b) the

man having the next lower seniority rating. If those comparables are taken into consideration in the sense that they are strictly averaged, then it would turn out that the award to White and the award to Purdham would be less than the awards which the Deputy Commissioner actually made, so that I think it can be shown mathematically that in the interest of fairness, the Deputy Commissioner actually came out with the averages of the particular employees, but I think the significant thing is that the other evidence was received to show that those averages, as a projection of past economic ability to earn money, are not out of line, in other words, that what is done by projecting the actual earnings of Mr. White and Mr. Purdham and using them as the basis for the award is not to create any great inequity or great disparity compared to what would be done if you took the averages of other comparable people.

It seems to me, therefore, that under the circumstances, the method in which the actual computation was made by the Deputy Commissioner was within the law and was certainly within the realm of his expertise and the element of administrative discretion vested in him, so that I am unable to say that the award was not properly made as a matter of law, or that he did not consider the proper evidence, or that the result at which he arrived is not supported by substantial evidence.

Coming to the conclusion, therefore, gentlemen, that there are no legal infirmities in either of the two grounds upon which the awards of the Deputy Commissioner are made in each of these two cases, I will dismiss the suits for injunction, believing as I do that the awards of the Deputy Commissioner in each of the two cases are correct and should be affirmed.

I will ask you, Mr. Cinnamond, if you and Mr. Lilly can prepare a short form of order for me.

United States Department of Labor — Bureau of Employees' Compensation

Fourth Compensation District

COMPENSATION ORDER AWARD OF COMPENSATION

(Case No. 61-3476 — Joseph B. White)

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

FINDINGS OF FACT

That on the 30th day of March 1962, the claimant above named was in the employ of the employer above named at Baltimore in the State of Maryland, in the Fourth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was self-insured; that on said day, claimant herein while performing service as an ironworker, chipper and caulker for the employer and engaged in repairing the S/S "CHERRY VALLEY", which was afloat in the Patapsco River, sustained accidental injury resulting in his disability when while chipping a section of catwalk railing, the section fell on his left foot, causing fracture of the base of the second metatarsal; that written notice of injury was not given within thirty days but the employer had knowledge of the injury and has not been prejudiced by lack of such written notice; that the employer furnished claimant with medical treatment, etc., in accordance with Section 7(a) of the said Act; that the claimant's average earnings for the year immediately preceding the date of his injury are $1,793.14; that the average weekly wage is $34.48; that as the result of the injury sustained, the claimant was wholly disabled from 31 March 1962 to 3 June 1962, inclusive, and he is entitled to 9$\frac{3}{7}$ weeks compensation at the rate of $22.99 per week for such temporary total disability; that as a further result of the injury sustained, the claimant has

permanent partial disability equal to 17½% loss of use of his left foot and he is entitled to 35.88 weeks compensation at the rate of $22.99 per week for such partial disability; that the compensation for temporary total disability amounts to $213.48; that the compensation for permanent partial disability amounts to $824.88; that the compensation for temporary total disability and permanent partial disability amounts to $1,038.36; that the employer and self-insurer have paid $422.13 to the claimant as compensation.

Upon the foregoing facts the Deputy Commissioner makes the following:

AWARD

That the employer and self-insurer, Maryland Shipbuilding & Drydock Company, shall pay to the claimant compensation as follows: for temporary total disability from 31 March 1962 to 3 June 1962, inclusive, 9⅔ weeks at $22.99 per week, $213.48, and for permanent partial disability, 35.88 weeks at $22.99 per week, $824.88, a total for all disability of $1,038.36. The employer and self-insurer having already paid $422.13 to the claimant as compensation, and sufficient time having elapsed since the date of last payment of compensation, shall pay forthwith the balance of $616.23 at which time the case shall be CLOSED.

Fees in the amount of $25.00 to Dr. Matyas Relle and in the amount of $150.00 to Bernard G. Link, claimant's attorney, are approved and shall be satisfied by deduction from compensation payable to the claimant.

Given under my hand at Baltimore, Maryland, this 20th day of June 1963.

STEPHEN O'HEARNE,
Deputy Commissioner
Fourth Compensation District.

United States Department of Labor — Bureau of Employees' Compensation

Fourth Compensation District
COMPENSATION ORDER AWARD OF COMPENSATION

(Case No. 61-3485 — James Purdham)

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

FINDINGS OF FACT

That on the 4th day of May 1962, the claimant above named was in the employ of the employer above named at Baltimore in the State of Maryland, in the Fourth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was self-insured; that on said day, claimant herein while performing service as a shipfitter for the employer and engaged in repairing the S/S "TAMPICO" which was afloat in the Patapsco River, sustained accidental injury resulting in his disability when while laying out a cut on a pipe, the pipe fell on his left hand, causing compound fracture of the shaft of the 5th metacarpal; that written notice of injury was not given within thirty days but the employer had knowledge of the injury and has not been prejudiced by lack of such written notice; that the employer furnished claimant with medical treatment, etc., in accordance with Section 7(a) of the said Act; that the claimant's average annual earnings for the year immediately preceding his injury are $3,725.27; that the average weekly wage of the claimant at the time of his injury was $71.64; that as the result of the injury sustained, the claimant was wholly disabled from 5 May 1962 to 1 July 1962, inclusive, and he is entitled to $8\frac{2}{7}$ weeks compensation at $47.76 for such total disability; that as a further result of the injury sustained, the claimant has permanent partial

disability equal to 10% loss of use of his left hand and he is entitled to 24.4 weeks compensation at the rate of $47.76 for such partial disability; that the compensation for temporary total disability amounts to $395.72; that the compensation for permanent partial disability amounts to $1,165.34; that the compensation for temporary total disability and permanent partial disability amounts to $1,561.06; that the employer and self-insurer have paid $395.72 to the claimant as compensation.

Upon the foregoing facts the Deputy Commissioner makes the following:

AWARD

That the employer and self-insurer, Maryland Shipbuilding & Drydock Company, shall pay to the claimant compensation as follows: for temporary total disability from 5 May 1962 to 1 July 1962, inclusive, 8⅔ weeks at $47.76 per week, $395.72, and for permanent partial disability 24.4 weeks at $47.76 per week, $1,165.34, a total for all disability of $1,561.06. The employer and self-insurer having already paid $395.72 to the claimant as compensation and sufficient time having elapsed since the date of last payment of compensation, shall pay forthwith the balance of $1,165.34 at which time the case shall be CLOSED.

Fees in the amount of $25.00 to Dr. Matyas Relle and in the amount of $200.00 to Bernard G. Link, claimant's attorney, are approved and shall be satisfied by deduction from compensation payable to the claimant.

Given under my hand at Baltimore, Maryland, this 20th day of June 1963.

STEPHEN O'HEARNE,
Deputy Commissioner,
Fourth Compensation District.

MEMORANDUM

(In support of Compensation Orders)

Case No. 61-3485

James Purdham

v.

Maryland Shipbuilding & Drydock Company

D/A 4 May 1962

Case No. 61-3476

Joseph B. White

v.

Maryland Shipbuilding & Drydock Company

D/A 20 May 1962

There are two issues in each of these cases. The issue of disability has been submitted on medical reports. The primary issue is the average weekly wage of the claimants at the time of injury. Each claimant has set forth $120.00 in his claim as the average weekly wage. This is arrived at by multiplying the hourly rate of $3.00 by 40 hours, although in White's case, he received an hourly differential of 7% or .21 per hour on account of night work. It is conceded that neither employee worked substantially 260 days for a five day worker in the year immediately preceding their injury, although Purdham has been carried on the rolls of the employer since 10 May 1955 and White since 10 September 1954. The claimants through their attorney hold that their average weekly wage should be determined under

Section 10(b) of the Act. The employer contends that the average weekly wage should be determined under Section 10(c).

Section 2(13) of the Act defines "Wages" as, "Wages means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of injury . . .". The money rate in force at the time of injury is set forth in the preceding paragraph. There are no decisions involving this definition. Section 10 concerns Determination of Pay. Although neither side claims that Subsection (a) of this section applies, it is necessary to dispose of this subsection before passing on to the next. Subsection (a) reads, "If the employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed". Each of the claimants was in the employ of the employer for much more than the one year preceding the date of injury in that they were kept on the rolls subject to recall when work became available. The manner in which they should be laid off and recalled is set forth in the agreement between the employer and the claimants' union in paragraph "V" starting on Page 4. Purdham actually worked 136 days preceding his injury but was paid for 149. The difference consists of 3 paid holidays and 10 days vacation. The actual days worked amounts to 52% of 260, the multiplier for a five-day worker. The 149 days for which he was paid amounts to 57%. White worked a total of 64 days. It is clear that neither employee worked in the employment for substantially the whole year immediately preceding the date of their injury.

Subsection (b) of Section 10 reads, "If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual

earnings, if a six-day worker, shall consist of three hundred times the the average daily wage or salary and if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed." The question is, can this subsection be fairly and reasonably applied. Neither of these employees worked elsewhere in the year immediately preceding their injury. However, the wages earned do not represent their entire income for this period. Both of them received unemployment compensation during the periods of [illegible]off. Unemployment compensation is neither "earnings" nor a measure of wage earning capacity. It is not a prerequisite of the employment and cannot be used in determining the average annual wage. If "employee of the same class" is to be distinguished from "employee of the same classification", then there is no other employee in the same class as either of these two employees on a seniority basis as established by the Union agreement. Those employees in the same classification as the claimants herein who enjoyed substantial employment for the year in question are those with much longer seniority or they are union officials. The union officials have top priority under the Union agreement with the employer.

On the whole, it appears that Subsection (b) was designed to protect new employees entering an employment that is substantially continuous. The employer contends that ship repair work is intermittent and discontinuous. In support of this contention they produced witnesses and charts from their own employment and from the largest firm in the field in this Port. If the charts and graphs were made on a daily basis of change, the changes would be much more erratic.

In Marshall v. Andrew F. Mahony Co., C.C.A. Wash. 1932, 56 F. 2d 74, the Court said, "Provision respecting annual earnings of employee, not working substantially whole year before injury, is inapplicable to longshore-

man working only 182 days during such year." Again in California Ship Service Co. v. Pillsbury the same court in 1949, 175 F. 2d 873, said, "Use of provision in subd. (b) of this section fixing injured employee's annual earnings at 300 times his or similar employee's daily wages is proper only in situations where employment is regular and substantially continuous". Fitness, readiness and willingness to work, considered in connection with opportunity to work are shown to be prerequisites in Hartford Accident & Indemnity Co. v. Hoage, 85 F. 2d 411, 416; 66 App. D.C. 154. The two cases more in line with the present cases are O'Hearne v. Maryland Cas. Co., C.A. Va. 1949, 177 F. 2d 979 and Johnson v. Britton 1961, 290 F. 2d 355, 110 U.S. App. D.C. 164, certiorari denied 82 S. Ct. 99, 368 U.S. 859, 7 L. Ed. 2d 56.

In O'Hearne the claimant had been in the employ of the employer two days at the time of injury. For the first half of the year immediately preceding his injury the claimant was serving out a term on a prison farm; the last half he was self-employed as a house painter. In the opinion of the court "Where employer and insurance carrier expressly informed deputy commissioner that they made no contention that employment of shipfitter was intermittent or discontinuous in nature but took the position that this section should be applied whenever the employment of claimant was intermittent and discontinuous, and the court in an action to enjoin enforcement of compensation order, adopted such position which the court of appeals held was erroneous the cause would not be remanded to the deputy commissioner to take further testimony as to whether the occupation of shipfitter in which the employee was engaged was intermittent and discontinuous in its nature". Here the employer did raise the issue at the first hearing on the claims and did submit evidence in support of their position.

In Johnson v. Britton, the claimant was a construction laborer. It was shown that he had worked for the employer 180 days and had earned $3399.76 on the days so worked in the year immediately preceding his injury. The

deputy commissioner held that such work record represents substantial employment and that the days not worked by the claimant were days on which no work was available or days when work could not be performed due to inclement weather and such employment was continuous employment. However, the deputy commissioner found the average weekly wage to be one-fifty second part of the average annual earnings actually earned. The court held that the wage computation was correct according to Section 10(c) of the Act and that Section 10(a) did not apply. It appears that 10(b) is to be used in a case such as O'Hearne v. Maryland Cas. Co. supra, where the employee was not working a full year in the job he was engaged in at the time of injury although the particular job affords year-round employment. Much more could be written and quoted on this subject without adding light. I am satisfied that Subsection (b) does not apply.

Subsection (c) reads, "If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee". This is the only place in the section that "earning capacity" is mentioned. As neither employee worked elsewhere in the year immediately preceding their injury either in the same or any other employment, there is nothing to consider unless "having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury . . ." permits using his earnings for a period longer than the one year immediately preceding the date of injury. It seems to me that the term has a more limited use and confines computation of the average weekly wage to

one year immediately preceding the date of injury. The employees working in the same or most similar class with respect to seniority are Kleppert, Badge No. 969, who worked 124 days and earned $3,873.41, and Brady, Badge No. 9813, who worked 126 days and was paid $3,476.76 (T-104). The subsection does not say we should use the wages earned by the most similarly employed employee, but to have regard to such earnings as a guide to what the claimant may have earned in the same employment. The claimant did not have the capacity in this employment to earn the wage of Kleppert because of the seniority rule. This rule is not the employers' but the claimants' bargaining agent.

It seems fairly established from the record that the employer did not hold out to either of these employees that they would have substantially full time work. Further, it seems fairly established from the record that these employees knew from their employment in the industry over a period of years that the employment did not offer substantially continuous work employment.

As both White and Purdham have been content to limit their efforts and income to the amount of work offered by the employer, plus unemployment compensation, their actual earnings in the employment fairly represent their annual wages and that 1/52nd part of such wages represents their average weekly wage. In Purdham's case the average weekly wage is $71.64, in White's case $34.48.

We come then to Purdham's entitlement to compensation. There is no issue as to the period of temporary total disability. He shall be awarded compensation for such disability from 5 May 1962 to 1 July 1962, 8 2/7 weeks at $47.76, $ 395.72

and for permanent partial disability equal to 10% loss of use of his left hand, 24.4 weeks at $47.76 per week, 1,165.34

a total for all disability of $1,561.06

of which the employer has already paid to the claimant as compensation 395.72

Sufficient time having elapsed since the date of last payment of compensation, the balance of $1,165.34

shall be paid, less approved fees, in one sum at which time the case shall be CLOSED. The approved fees are: Dr. Matyas Relle, $25.00; Attorney Bernard G. Link, $200.00.

It is agreed that White was temporarily totally disabled from 31 March 1962 to 3 June 1962, and he shall be awarded 9⅔ weeks compensation at the rate of $22.99 per week $ 213.48

and for permanent partial disability equal to 17½% loss of the use of the left foot, 35.88 weeks compensation at $22.99 per week. 824.88

a total for all disability of $1,038.36

of which the employer has already paid to the claimant as compensation 422.13

Sufficient time having elapsed since the date of last payment of compensation, the balance of, $ 616.23

less approved fees, shall be paid forthwith at which time the case shall be CLOSED. The approved fees are: Dr. Matyas Relle, $25.00; Attorney Bernard G. Link, $150.00.

APPENDIX B

Statute Involved

The statute involved in Section 910 of the Longshoremen's and Harborworkers' Compensation Act, 33 U.S.C.A. Section 901, et seq., hereinafter referred to as the Act, which reads as follows:

"Section 910. Determination of pay

Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings, if a six-day worker, shall consist of three hundred times the average daily wage or salary, and, if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar em-employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

(c) If either of the aforegoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the pre-

vious earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

(d) The average weekly wages of an employee shall be one fifty-second part of his average annual earnings."